IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

TUESDAY THE TWENTY SECOND DAY OF FEBRUARY
TWO THOUSAND AND FIVE

PRESENT

**THE HON'BLE SRI JUSTICE M.H.S. ANSARI**

**AND**
**THE HON'BLE SRI JUSTICE T.Ch.SURYA RAO**

**WRIT PETITION No.6991 of 2003**

Between:

M/s. Jivanlal & Sons,

A Partnership Concern, rep. by its Partner

Kamalesh Gandhi, S/o. Jitendra Gandhi
Having its Office at 129/131 ,

Kazi Syed Street, Mumbai-400 003.

**…. PETITIONER**

AND

1 The Commissioner of Commercial Taxes,
Govt. of A.P., Hyderabad.
2 Food Corporation of India,
Having its Regional Office at HACA Bhavan,

Opp: Public Gardens,
Hyderabad-500 004.
3 Union Bank Of India,
Foreign Exchange Department,

66/80 , M.S. Marg, Fort,

Mumbai.

**.....RESPONDENTS**

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed herein the High Court may be pleased to issue a writ , direction or order especially in the nature of writ of Mandamus declaring that the petitioner has no obligation to pay sales tax on the quantity of broken/damaged rice obtained on up-gradation of the rice procured from the second respondent for the purposes of export under the provisions of CST Act,1956 and consequently quash the letter dated 18-12-2002 issued by the 2nd respondent.

**Counsel for the Petitioner: Mr.S.RAVI**

**Counsel for Respondent No.1: SPECIAL G.P. FOR TAXES**

**Counsel for Respondent No.2: Mr.B.ANJANEYULU,**

**STANDING COUNSEL FOR FCI**

**Counsel for Respondent No.3: None appeared.**

**The Court at the admission stage made the following :**

**ORDER:** (per Sri Justice M.H.S.Ansari)

Notice before admission was issued and pursuant thereto counter affidavit has been filed by FCI. The question for consideration is as to whether we should exercise the discretion to entertain the writ petition.

The relief claimed in the writ petitions is for a writ in the nature of mandamus for a declaration that the petitioner has no obligation to pay sales tax/Central sales tax on the quantity of broken/damaged Rice procured from the Food Corporation of India and consequently to quash the letter dated 18-12-2002 issued by FCI.

By its said impugned letter dated 18-12-2002, FCI called upon the petitioner to pay CST for the un-exported quantity of raw Rice, being the difference in the quantity purchased from FCI and the un-exported quantity. The H Form furnished by the petitioner was found to be defective, difference was noticed in the quantities lifted and quantity exported. Claim was also made with respect to the sales tax on gunny in the absence of C-Forms.

Interim reliefs prayed for are with respect to the encashment of bank

guarantees issued to third respondent Bank.

FCI is a registered dealer under the APGST Act and by virtue thereof it is its obligation to collect tax from its customers - the writ petitioner for payment of the same to the Government. It is the case of FCI that exempted exports under Section 5(3) of the CST Act are with respect to the Rice exported for which Form-H under Section 12(10) of the CST Act is to be furnished. The goods were lifted by the petitioner from FCI for export and if the entire quantities of such goods are not exported, the liability of FCI to pay sales tax or CST would arise as the first sale is in the State of Andhra Pradesh in respect of the quantities remaining un-exported. The further case of FCI is that as the petitioner failed to remit the statutory tax and also failed to rectify the H-Form submitted by it, FCI was entitled to invoke the bank guarantee.

According to the petitioner, the Rice sold by FCI is not capable of being exported in the same form as it contains certain percentage of broken Rice/damaged Rice. The petitioner has to upgrade the same removing such defects for the purpose of exports. The broken/ damaged Rice was sold in the domestic market in the State of Maharashtra. As the said local sale is exempted in the State of Maharashtra, there is no liability to pay tax to FCI and, therefore, FCI is neither entitled to make a claim as it did by the impugned notice or to invoke the bank guarantee.

Learned counsel for the petitioner and the learned Standing Counsel for FCI have reiterated the contentions respectively as above. Learned counsel for the Sales Tax authorities submitted that the dispute is *inter se* the contracting parties. The question of determination of the liability to tax or quantum thereof, it was urged, cannot be subject matter of consideration in the instant writ petition.

In exercise of its jurisdiction under Article 226 of the Constitution of India, a Writ Court, in our view, would not be justified in entering upon an enquiry into the contentions, as raised herein. This is a matter which can appropriately be considered by the tax authorities in the assessments which are yet to be made on the turnovers of FCI. A Writ Court does not usurp the statutory functions of the authorities vested with such power. A Writ Court can step in either when there is failure of exercise of power or when power is not exercised properly, but the Court does not itself take a decision which in law is required to be taken by the statutory authorities.

Admittedly, FCI is a dealer registered under the APGST Act and is liable to pay tax on its turnover. Whether the transactions in question in the instant writ proceedings are exigible to CST and if so what would be the tax payable thereon are matters which it would not be either appropriate or prudent to adjudicate in these proceedings being in the province of the assessing authorities constituted under the APGST Act. It is to be noted that by the impugned order dated 18-12-2002, FCI is not enforcing any statutory rights. Such claim of FCI is only traceable to its contract with the petitioner. Unless it is established that the instrumentality/agency of the State is acting arbitrarily without any semblance of justification to demand payment from the petitioner, no interference is warranted, more particularly at this stage of proceedings. It is precisely for reimbursement of taxes, which FCI may be called upon to pay that bank guarantees have been obtained in terms of the contract. It is premature for this Court to embark on an enquiry into the determination of tax liability of FCI on the goods sold to the petitioner. As already noticed, the liability of FCI would depend upon the assessment made by the competent authority and it is, therefore, premature for us to assume that no tax is liable to be paid on the transactions in question. We are, therefore, not inclined to entertain the writ petition.

The relief in the nature of interim orders prayed for in the instant writ petition is for restraining the FCI from invoking the bank guarantee. Certain interim orders were also passed on the said prayer of the petitioner and are subsisting.

The rule is well established that a bank issuing a guarantee is not concerned with the underlying contract between the parties to the contract. The duty of the bank under a guarantee is created by the document itself. The Courts normally do not interfere directly or indirectly to withhold payment, much less in exercise of its writ jurisdiction in the case as the one on hand. The parties to the underlying contract are not remedy-less. Resort to civil suit or arbitration as the case may be are the efficacious remedies available.

The law relating to invocation of bank guarantees is by now well settled by several judicial pronouncements of the Supreme Court. Reference to one such decision has been made by Sri B.Anjaneyulu, learned Standing Counsel for FCI in **U.P. State Sugar Corporation v. Sumac International Ltd.**. In that case, it was *inter alia* held that when in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such bank

guarantee in terms thereof irrespective of any pending disputes. The Courts, it was observed, should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. However, the two exceptions which have been carved out by Courts are – 1) fraud which would vitiate the very foundation of such bank guarantee; 2) irretrievable harm or injustice to one of the parties concerned. In the case on hand, there is no allegation of fraud. Also no case is made out with respect to irretrievable harm or injustice. It was, however, submitted by Sri S. Ravi, learned counsel for the petitioner that FCI being an agency/ instrumentality of the State is bound to act in a fair and just manner. It cannot invoke the bank guarantee for the amounts covered thereby save to the extent of its liability to recoup itself for the tax that may be levied with respect to the transactions in question. It was thereupon contended that until such time as assessment is made by the tax authorities by the FCI, the bank guarantees shall not be invoked and after the assessments it may be invoked only to cover such amounts as may be lawfully due with respect to the transactions in question. We are not inclined to give any positive directions in that behalf as we are not inclined to entertain the writ petition for the reasons afore-stated. The only observation we make is that it shall be open to the petitioner to make appropriate representation to the FCI in this behalf and it is for the respondent FCI to consider the same in its sole discretion.

The writ petition is accordingly dismissed at admission stage. No order as to costs.

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(M.H.S.ANSARI, J.)

22nd February 2005.

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(T. Ch. SURYA RAO, J.)

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To

1.The Commissioner of Commercial Taxes, Govt. of A.P., Hyderabad.
2.The Regional Manager, Food Corporation of India, Regional Office,HACA Bhavan, Opp: Public Gardens, Hyderabad-500 004.
3. The Manager, Union Bank Of India, Foreign Exchange Department,

66/80 , M.S. Marg, Fort, Mumbai.

4. Two C.Cs to Special G.P. for Taxes, High Court Bldgs., Hyderabad (OUT).

5. Two CD copies.